

Before the

**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY
ADMINISTRATION**

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WASHINGTON, DC

Docket No. FMCSA-2001-11060

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

Comments by



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Introduction

The Commercial Vehicle Safety Alliance supports the Federal Motor Carrier Safety Administration's attempts to formally recognize the efforts of federal and state safety professionals who are performing Roadside Inspections, Safety Audits and Compliance Reviews. There is research to indicate, as recent as several months ago in two reports issued by FMCSA [*FMCSA Safety Program Performance Measures Intervention Model: Roadside Inspection and Traffic Enforcement Effectiveness Assessment (Revision 1)*, December 2001, FMCSA-RI-02-004; and *FMCSA Safety Program Performance Measures Compliance Review Impact Assessment Model*, February 2002, (Revision 1), FMCSA_RI_02_005] that these activities save a significant number of lives and injuries. Thus, there is an essential need to provide the proper environment to develop, maintain and enhance the knowledge of individuals performing these functions. Additionally, it is of equal importance to establish a rigorous and standardized quality control process for maintaining program integrity, uniformity and continuity. CVSA also believes it is our obligation to the industry to provide an open discussion on the issues affecting commercial vehicle safety and security – to ultimately deliver educational, compliance and enforcement programs that are performance driven, results oriented, accessible and equitable.

Prior to the creation of the Motor Carrier Safety Assistance Program, the CVSA recognized the importance of establishing a roadside inspection certification program with the qualities enumerated above. Even more importantly, the impetus behind the development of the North American Standard Inspection, Out of Service Criteria and CVSA Decal is uniformity and reciprocity. Developing and maintaining standards to implement these functions has been the hallmark of CVSA's existence since 1982. The process with which this implementation occurs has stood the test of time and is embraced by both government and industry – in all three countries within North America, and even beyond the boundaries of the continent. The experience and credibility CVSA has gained in the last 20 years uniquely qualifies CVSA to provide meaningful comments on this rulemaking.

CVSA has achieved the following successes:

- Developed international truck and bus roadside inspection standards and procedures, as well as certification and training standards and programs for inspectors.

- Conduct more than 2.5 Million North American Standard Roadside Inspections annually in the United States alone.
- There are approximately 10,000 CVSA Certified Roadside Inspectors in North America.
- Developed and maintain the North American Standard Inspection (all 6 types), North American Standard Out of Service Criteria and the CVSA Decal Program.
- Implemented the state Motor Carrier Safety Assistance Program (MCSAP) and ensured the development of comprehensive truck and bus safety programs in all 50 states, the District of Columbia, the provinces of Canada, Mexico, and US and Canadian Territories.
- Significantly reduced the commercial vehicle crash rate on North American highways.
- Stressed uniform and reciprocal safety standards and enforcement practices in all CVSA member jurisdictions, which include all of the United States, District of Columbia, Canadian Provinces, US and Canadian Territories, and Mexico.

We have some questions about FMCSA's attempts to fulfill multiple obligations in the issuance of these regulations. Several provisions in the Motor Carrier Safety Improvement Act of 1999, specifically Sections 210 and 211, as well as the requirements placed upon the administration through the North American Free Trade Agreement have somewhat clouded the fundamental principles of a certification program. These principles being that a certification program must be current, credible, accessible, competency-based and reflective of the standards of the profession, as well as valid, reliable and legally defensible. First, the intent of sections 210 and 211 in MCSIA were to require FMCSA to implement a program for evaluating the safety fitness of "New Entrants" to the motor carrier industry, while simultaneously establishing a certification program for individuals performing reviews or audits of these entities. Such reviews or audits were not intended to result in safety ratings or enforcement action. Second, NAFTA implementation has placed increased requirements on FMCSA and the States in an operational context, primarily with regard to the amount of attention that will be devoted to carriers, vehicles and drivers prior to and in the initial stages of them operating within the United States and Canada.

To help illustrate this point, MCSIA specifically states, in Sections 210 and 211:

"SEC. 210. NEW MOTOR CARRIER ENTRANT REQUIREMENTS.
(a) SAFETY REVIEWS.—

(c) SAFETY REVIEWS OF NEW OPERATORS.—

(1) IN GENERAL.—The Secretary shall require, by regulation, each owner and each operator granted new operating authority, after the date on which section 31148(b) is first implemented, to undergo a safety review within the first 18 months after the owner or operator, as the case may be, begins operations under such authority.

(2) ELEMENTS.—In the regulations issued pursuant to paragraph (1), the Secretary shall establish the elements of the safety review, including basic safety management controls. In establishing such elements, the Secretary shall consider their effects on small businesses and shall consider establishing alternate locations where such reviews may be conducted for the convenience of small businesses.

(3) PHASE-IN OF REQUIREMENT.—The Secretary shall phase in the requirements of paragraph (1) in a manner that takes into account the availability of certified motor carrier safety auditors.

(4) NEW ENTRANT AUTHORITY.—Notwithstanding any other provision of this title, any new operating authority granted after the date on which section 31148(b) is first implemented shall be designated as new entrant authority until the safety review required by paragraph (1) is completed.

(b) MINIMUM REQUIREMENTS.—The Secretary shall initiate a rulemaking to establish minimum requirements for applicant motor carriers, including foreign motor carriers, seeking Federal interstate operating authority to ensure applicant carriers are knowledgeable about applicable Federal motor carrier safety standards.

SEC 211. CERTIFICATION OF SAFETY AUDITORS.

§ 31148. Certified motor carrier safety auditors

(a) IN GENERAL.—...the Secretary of Transportation shall complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors, including private contractors, to conduct safety inspection audits and reviews described in subsection (b).

(b) CERTIFIED INSPECTION AUDIT REQUIREMENT.—Not later than 1 year after completion of the rulemaking required by subsection (a), any safety inspection audit or review required by, or based on the authority of, this chapter or chapter 5, 313, or 315 of this title and performed after December 31, 2002, shall be conducted by—

(1) a motor carrier safety auditor certified under subsection (a); or

(2) a Federal or State employee who, on the date of the enactment of this section, was qualified to perform such an audit or review.”

(d) APPLICATION WITH OTHER AUTHORITY.—The Secretary may not delegate the Secretary’s authority to private contractors to issue ratings or operating authority, and nothing in this section authorizes any private contractor to issue ratings or operating authority.”

At a fundamental level, with all of these directives and legislative actions Congress is telling FMCSA that it needs to have a more rigorous quality control

program for promoting industry education and compliance on new entrants to the motor carrier industry. As CVSA commented on in our Docket submission to FMCSA's Notice of Proposed Rulemakings issued in May of 2001 regarding NAFTA, there is evidence to indicate that motor carriers and drivers "new" to the business are involved in more crashes. We believe FMCSA has taken action on these directives to expand the scope of its regulatory authority in a manner that is inconsistent with what Congress intended. Two primary examples of this are 1) the FMVSS regulations FMCSA and NHTSA have proposed for Canadian and Mexican commercial vehicles and 2) the certification requirements for Roadside Inspectors, Safety Auditors and Safety Investigators.

With more than 600,000 interstate motor carriers in the United States alone and at least as many intrastate carriers, to fulfill its mission the FMCSA and the States need more resources – but these must be targeted to the areas that need it. We also remind FMCSA that it must be cautious in expanding its delegated authority by a reinterpretation of key statutory terminology, as it oversteps its bounds and ultimately may encroach upon the existing authorities of the States.

The majority of motor carriers have never encountered a safety professional – federal, state or otherwise – either for a Compliance Review, Safety Review or Roadside Inspection. And, although the commercial vehicle crash rate has dropped significantly over the last 20 years, the absolute number of fatalities and injuries resulting from crashes involving commercial vehicles still remains at an unacceptable level.

We need to do more, but we need to be measured in the approach.

Certification Programs

Certification focuses on demonstrated knowledge and competence and successful programs built on a foundation of core competencies identified and updated periodically by practitioners in the field. Volunteers at all experience levels and topic specialties legitimize the program through their participation at each stage of the process. Certification is a professional development tool that expands ongoing job-related education beyond the academic community to include the application of principles and standards for competent practice. Peer review and consensus decision-making are basic to the development of an effective Certification program.

The regulations being proposed here by FMCSA offer an incredible opportunity to significantly increase the amount of attention given to new entrants – as well as to expand the pool of individuals qualified to “touch” them. From the law enforcement perspective, there is no better way to positively influence behavior than face-to-face encounters. These regulations also offer an excellent opportunity to formalize the process with which seasoned safety professionals perform their job functions. This provides an environment that promotes continued professional education and development, ultimately resulting in improved education, compliance and enforcement actions on high-risk motor carriers, vehicles and drivers.

Specific Comments and Recommendations

A critical component of a certification program is to explicitly identify the requirements and expectations on those individuals who are certified. Equally important is to establish a rigorous quality control program that has checks and balances. We believe the regulations being proposed here by FMCSA fall short in meeting these two requirements. All safety professionals, whether Federal, State or contracted should meet the same levels of competency. In addition, they should all have the same requirements for training and recertification.

Certification Criteria, Uniformity and Reciprocity

Our first recommendation is to *codify the CVSA Certification requirements for Roadside Inspectors by incorporating them by reference into FMCSA’s regulations*. The CVSA process and criteria go beyond what FMCSA is proposing here, are more explicit, and have an established infrastructure that is accepted in the community. There are differences in the criteria FMCSA is proposing and those of CVSA, specifically in the areas of testing, training and the maintenance of certification. Rather than list all of the differences, Attachment A provides a side-by-side comparison of the CVSA Criteria and the FMCSA proposed Criteria for Roadside Inspectors. We understand that the federal requirements are minimum standards, but we believe there is not a need to recreate the wheel and establish two separate approaches, especially in light of the fact that the CVSA program is internationally recognized. Additionally, having separate directives for Federal and State Inspectors sends a mixed signal to industry, and creates potential for conflicts between state and federal programs and personnel.

We also believe the same approach should be taken with the Certification of Safety Auditors and Safety Investigators. Since federal and state enforcement personnel will be performing these functions, they should follow the same quality control processes. By providing more explicit details within FMCSA's regulations on what these certification programs will entail, it will offer additional benefits in that the industry will be better equipped to self-monitor. CVSA offers our assistance to provide the institutional infrastructure and knowledge to assist FMCSA in developing and managing this effort.

By not explicitly identifying the certification criteria by regulation, or at least a process with which these criteria are developed and maintained, it leaves open the possibility of interpretation and arbitrary changes. There needs to be a process to ensure proper quality control and assurance.

To put emphasis on the importance of this point, each of the functions performed by these certified professionals will impact the safety fitness of the motor carrier industry, as codified in 49 CFR Part 385. Thus, it is vitally important that in order to promote uniformity, reciprocity and equitable treatment all three certification programs must adhere to standard and uniform quality control processes. *We question that the approach FMCSA has taken regarding the process to implement these rules, along with the proposed path of implementation – is there a violation of the Administrative Procedures Act?*

According to the language in §385.201, it appears that employees conducting Compliance Reviews before June 17, 2002 will be allowed to continue to conduct reviews after that date – and these same employees will also be certified to conduct roadside commercial vehicle inspections. CVSA is concerned this will allow employees not currently certified to inspect commercial vehicles to be “grandfathered” to inspect commercial vehicles after June 17 – merely because the employee had been conducting Compliance Reviews. *Any employee, including employees of the FMCSA who wish to conduct commercial vehicle inspections, should be fully trained and certified in accordance with CVSA guidelines.*

§385.201 also contains the language, “An FMCSA employee, or a State or local government employee funded through MCSAP,....” Some States have employees who are not funded through MCSAP that are conducting Compliance Reviews and Roadside Inspections. To add, §385.203 contains the following language that is of concern to CVSA: “After June 17, 2002, a person who is not qualified under § 385.201(a) may not perform a compliance review, safety audit, or

roadside inspection unless he or she has been certified by FMCSA or a State or local agency applying the FMCSA standards....”. This provision appears to open the door to any agency – state, local or otherwise – to certify themselves to be able to conduct Roadside Inspections, Safety Audits or Compliance Reviews.

To deal with these two particular issues, we recommend the following:

- Remove the reference to being funded through MCSAP – the funding mechanism is not relevant in Part 385;
- Insert language that will require any state, local or other agencies and their personnel to be certified by the Lead MCSAP Agency in the State – and to have these agencies and their certified personnel adhere to the same performance requirements placed on the Lead MCSAP Agency (49 CFR Part 350; i.e. data collection, upload, etc.). This language is important, as it will help maintain uniformity and permit the lead agencies to have more control over managing operations in their respective States. With the current level of interest high for involving more “local” jurisdictions in commercial vehicle enforcement, by codifying the certification it provides lead agencies with the regulatory authority to enforce quality control. This is important for maintaining uniformity, integrity and quality, especially for data collection and upload – as well as for protecting against those agencies who wish to create programs for the purposes of revenue generation and not safety.

Additional Recommendations

1. The regulations provide no specifics on testing requirements and what is considered a “passing” score, this should be addressed in the final rule; and
2. FMCSA does not recognize the North American Standard Inspection Levels II, III, IV and VI in the proposed regulations. These types of inspections are important tools for enforcement programs in the states and provinces and they need to be formally recognized by regulation. The North American Standard Inspection is already generically defined in Part 350. We recommend that all levels of inspection be explicitly defined in the FMCSA regulations, as well as a description of how each of them impacts the safety rating. State and provincial enforcement and regulatory personnel often use the Level II, III and IV inspections, as well as the Level VI for radioactive shipments. By not recognizing them, FMCSA’s omission might be construed as undermining the validity of these inspections, or cause industry to question why the States use them, but Federal personnel do not.

Additional important factors to consider for the final rule are the following:

- We support FMCSA's intent to continue allowing Lead Agencies to self-certify their programs, as is current practice with the Commercial Vehicle Safety Planning Process;
- Many US jurisdictions have incorporated the CVSA standards into their statutes, which may be problematic in the event the final rule does not adopt the CVSA program; and
- Canada and Mexico use the CVSA Certification program for their Roadside Inspectors, which again if the CVSA program is not recognized it will be problematic in terms of uniformity and consistency.

Training

By its own admission FMCSA states in the Interim Final Rule that "The FMCSA is not including specific training requirements in this regulation. The agency needs flexibility to modify course content quickly to match changes in the FMCSRs and HMRs, or to adapt other elements of the training process to changed circumstances. Codification would make the program inflexible and difficult to manage." We do not fully agree with this statement – the Policies, Practices and Procedures in the CVSA Certification program include specific training requirements. By incorporating CVSA by reference (for Roadside Inspectors) FMCSA will be able to maintain flexibility, while at the same time maintain the quality control necessary for a Certification program. We need to ensure that only certified personnel are uploading data to state and federal safety information systems.

Recommendations

1. Explicitly identify in the FMCSA regulations the initial training requirements – courses, content and duration – as well as in-service or continuing training requirements and the schedule on which they should be delivered. An example is that the MCSAP regulations require annual in-service training, yet FMCSA is proposing no such requirements for Safety Auditors or Investigators. The more ambiguity there is, more opportunity exists for differing interpretations and ultimately will result in uniformity problems;
2. Formally recognize the Educational Quality Assurance Team as the body that coordinates and approves changes to all training courses and curricula for the three certification programs.; and
3. Specify which certifications an individual must hold to perform certain functions (i.e. would someone certified as a Roadside Inspector be able to

perform Compliance Reviews, would an individual certified as a Safety Investigator be able to conduct Roadside Inspections, would an individual certified as a Roadside Inspector be able to conduct Safety Audits, etc.).

In addition, we have concerns as to the ability of FMCSA and the National Training Center to provide the requisite training needs for these 3 certifications. There are not enough resources currently to meet the needs of both federal and state personnel, and scheduling priority for training (understandably) is given to federal personnel – even though the overwhelming majority of instructors are state personnel. CVSA offers our continued assistance to FMCSA in managing and delivering on these training needs. *The resources provided by the administrative takedown are not enough for the States, and FMCSA does not provide enough of its own resources to support the demands placed on NTC.*

Non-governmental employees

CVSA is not opposed to non-government employees (private contractors) conducting safety audits, as long as the results of these audits are not used for Safety Ratings or enforcement purposes. Non-governmental employees (private contractors) should not be permitted to conduct Roadside Inspections, as this is clearly an enforcement and government function.

Again, to illustrate this point we have included this excerpt from MCSIA:

“SEC 211. CERTIFICATION OF SAFETY AUDITORS.

§ 31148. Certified motor carrier safety auditors

(d) APPLICATION WITH OTHER AUTHORITY.—The Secretary may not delegate the Secretary’s authority to private contractors to issue ratings or operating authority, and nothing in this section authorizes any private contractor to issue ratings or operating authority.”

The safety audit is an opportunity to provide educational information to the motor carrier and assess the motor carrier’s safety management practices. What is unclear is how a program for non-governmental employees (private contractors) would be managed and administered to ensure quality control and uniformity.

Canada is currently considering the adoption of a 3rd Party Certification Program for non-governmental employees. *In the spirit of NAFTA and reciprocity, FMCSA should investigate this program – it may provide opportunities to establish another tool to help “touch” more motor carriers.* Additionally, CVSA

has done some exploratory work on this concept and would be glad to assist the Agency in determining its viability in saving lives and injuries.

Conclusion

These proposed regulations symbolize the underpinning of a better and brighter future for commercial vehicle safety. We believe the Congress has directed FMCSA to establish a Certification Program for individuals conducting Safety Audits on New Entrants into the motor carrier industry, not for those conducting Roadside Inspections. We also believe the Congress does not want these activities to be used for the issuance of Safety Ratings or for enforcement purposes.

To summarize our key points:

- Codify the CVSA Certification requirements for Roadside Inspectors by incorporating them into 49 CFR Part 385 by reference. There are many examples of this throughout government, and in fact CVSA is already mentioned in several locations in 49 CFR and in federal and state statutes;
- It is of paramount importance that these three certification programs leverage existing processes and procedures where possible, and for Roadside Inspectors it should be the CVSA program. We also believe the same approach should be taken with the Certification of Safety Auditors and Safety Investigators.
- It is of equal importance that comprehensive quality control programs be established and maintained to ensure program integrity and uniformity. We suggest that the CVSA process for Roadside Inspectors be considered as a model to facilitate the Safety Auditor and Safety Investigator Certification Programs;
- There are inconsistencies with these regulations and those being promulgated through NAFTA and the Fiscal Year 2002 DOT Appropriations Act. Specifically that the CVSA North American Standard Inspection, CVSA Certified Inspector, CVSA Out of Service Criteria, and CVSA Decal Program are all explicitly mentioned in the Fiscal Year 2002 DOT Appropriations Act and NAFTA regulations, yet they are not mentioned here except that FMCSA recognizes the FMCSA/CVSA Out of Service Criteria. FMCSA needs to clarify and make consistent (where appropriate) these regulations with those that have already been promulgated into law through NAFTA and the DOT Appropriations Act;

- Given the diversity of State needs, personnel, funding, programs and statutes, as well as the limitations of federal staff in terms of oversight and administrative capabilities, States need the flexibility to self-certify their programs – and the Lead MCSAP Agency should bear this responsibility;
- The regulations must be more explicit in what the certification requirements and criteria are, especially as they relate to initial and recurring training, testing and defining the various Levels of Inspection;
- We need to take into consideration the fact that Canada and Mexico are important safety partners and have qualified people performing these functions; and
- Continue to explore the feasibility of non-governmental employees (private or 3rd party contractors) helping in our mission of saving lives and injuries and property damage on our North American Roadways.

The overarching requirement for all of these issues is to have a comprehensive training program development, delivery and quality control process.

FMCSA has taken an important step in issuing this proposal, and CVSA wants to be a part of the solution. We are ready to assist the Agency in its endeavors to implement these regulations, as well as providing assistance for the ongoing operations and management needs of these three certification programs.